STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**)**	
On Its Own Motion	**)**	
vs	**)**	
Illinois Bell Telephone Company	**)**	**Docket 06-0027**
	)	
Investigation of specified tariffs declaring certain services to be competitive telecommunications services	**)**	

JOINT RESPONSE OF DATA NET SYSTEMS, L.L.C. AND TRUCOMM CORPORATION TO THE OBJECTION OF AT&T ILLINOIS TO THEIR PETITIONS TO INTERVENE

Data Net Systems, L.L.C. ("Data Net") and TruComm Corporation ("TruComm") (collectively "Petitioners") hereby file their joint response to the Objection of AT&T Illinois to Petitions to Intervene of Data Net Systems, L.L.C., and TruComm Corporation.

On February 1, 2006, prior to any substantive hearings having been conducted in the instant proceeding, Data Net and TruComm each filed with the Illinois Commerce Commission ("Commission") a Petition to Intervene in the instant proceeding. At the initial status hearing held on February 2, 2006, Illinois Bell Telephone Company d/b/a AT&T Illinois ("AT&T Illinois")[1] objected to the petitions and, pursuant to the direction of the Administrative Law Judge, filed written objections on February 6, 2006. AT&T Illinois objects on the grounds that: (1) the Commission Rules require the petitions to include a "plain and concise statement of the nature of the petitioner's interest", which AT&T Illinois claims the petitions fail to identify in any way; and (2) AT&T Illinois is not aware of any legally cognizable interest of either petitioner in the classification of

[1] AT&T Illinois shall be used throughout this response to refer to Illinois Bell Telephone Company in any of the various names that it has been known as since 1984.

AT&T Illinois retail services to residential customers. Petitioners respond that each identified in its petition that it is a certified provider of local exchange services. To the extent any further exposition of this is necessary, Petitioners hereby submit that each provides local exchange services to residential consumers in MSA-1 (the Chicago LATA). The Commission and the Courts have long recognized not only the interest of competing telecommunications carriers in the appropriate classification of AT&T Illinois services, and in the application of the legal requirements attendant to analyzing a proposed competitive classification of AT&T Illinois services, but also the particular value of their input as to the factual, policy and legal considerations that must be addressed in a classification investigation. These well-established principles wholly support granting the Petitions to Intervene.

Since the initial service classification case under the Universal Telephone Service Protection Law of 1985 (Article XII of the Illinois Public Utilities Act ("Act")), the Commission has recognized the interest of competitive carriers in the proposed reclassification of a noncompetitive service to a competitive service and has approved their intervention. When AT&T Communications of Illinois, Inc. sought to reclassify its intrastate long distance services from noncompetitive to competitive, MCI Telecommunications Corp. was permitted to intervene as an interested party to participate in the Commission's investigation. See *MCI Telecommunications Corp. v. ICC,* 168 Ill.App.3d 1008 (1st Dist. 1988). As the Commission investigated the classification of various AT&T Illinois services, a competitive carrier's interest in the determination of the appropriate classification of AT&T Illinois services also has been recognized by the Commission. See *Re Illinois Bell Telephone Company,* ICC Docket No. 90-0264, Order,

April 26, 1991 (proposed reclassification of AT&T Illinois operator services – petitions to intervene of MCI Telecommunications Corp., AT&T Communications of Illinois, Inc. and the Independent Coin Payphone Association granted); *Illinois Bell Telephone Company, Proposed reclassification of Bands B and C Business Usage and Business Operator Assistance/Credit Card surcharges to competitive status. Filing to increase the Business Band C rates and eliminate shoulder peak discounts,* ICC Docket Nos. 95-0134 & 95-0179 (consol.), Order, October 16, 1995, 1995 WL 17200717 ("*1995 AT&T Illinois Business Reclassification Order*") (proposed reclassification of AT&T Illinois business usage services in Bands B and C – petitions to intervene of MCI Telecommunications Corp., AT&T Communications of Illinois, Inc., TC Systems-Illinois, Inc., The Cable Television and Communications Association of Illinois, Sprint Communications LP, LDDS Worldcom, Inc., and Southwestern Bell Mobile Systems, Inc. granted). See also *Independent Coin Payphone Association v. Illinois Bell Telephone Company,* ICC Docket No. 88-0412, Order, June 7, 1995 (complaint as to the appropriate classification of AT&T Illinois payphone services) (petitions to intervene of MCI Telecommunications Corp., Central Telephone Company of Illinois, Illinois Telephone Company, Kalyh Payphone Company, Quick Call, Inc., and American Pay Telephone Company granted.)

Competing carriers' intervention in the appropriate classification of AT&T Illinois retail services have been fundamental to the classification investigation and to the implementation of the attendant regulatory requirements involved under the Act. The classification of services governs many of the regulatory provisions of the Act and is dependent upon a variety of factors that the Commission must consider in reaching its determination. The interplay of these factors is not always obvious to the Commission or

to other parties not engaged in the actual provision of services. A competitive classification involves more than the simple identification of other providers of the service. Beyond this the Commission needs to examine the underlying functional elements of the service itself. In past dockets, the Commission has relied on the knowledgeable input of competitive carriers to understand the pertinence of these relevant factors. The Commission has recognized that the overall requirements and policies of the Act governing a competitive classification may not be met despite record evidence of the availability of other competing carriers. See *1995 AT&T Illinois Business Reclassification Order*, 1995 WL 17200717, p. 18 – 19, affirmed *Illinois Bell Telephone Company v. ICC*, 282 Ill.App.3d 672 (3rd Dist. 1996).

In addressing an attempt by AT&T Illinois to reclassify business services as competitive, the Commission noted that the Act is a " 'comprehensive legislative enactment' . . . It is not a dissociated legislative directive to be read in isolation, without regard to the statute and its policy objectives taken as a whole." *1995 AT&T Illinois Business Reclassification Order*, 1995 WL 17200717, p. 17. The Act governs the regulation of various aspects of telecommunications, including, but not limited to, retail services, wholesale services, pricing, terms, conditions, treatment of costs, notice, public safety, etc. These regulatory provisions interplay with each other to compose a comprehensive and balanced approach to the goals of the Act. It is not sufficient to pluck a single provision of the Act to study it in isolation from and without consideration of the rest of the statutory scheme and the practical factors affecting accomplishment of that scheme. Although AT&T Illinois contends that the regulation of its retail residential

service is unrelated to any interest of the Petitioners, a review of the Act rebuts this proposition.

Section 13-502 (c) includes a number of minimum requirements for reclassification that concern competing carriers. These include: the ability of a competing carrier to make the same, equivalent, or substitute service readily available in the relevant market at comparable rates, terms, and conditions; the existence of economic, technological, or other barriers to entry into, or exit from, the relevant market; the extent a competing carrier must rely on the service of another carrier to provide service; and other factors that may affect competition and the public interest. 220 ILCS 5/13-502(c). Neither the Commission Staff nor the consumer advocates would have the first hand experience of many of these factors to understand or appreciate the practical significance of them, and their application to the current investigation, that competitive carriers like Petitioners can provide. These inputs would not be adequately represented without Petitioners' participation.

In the statutory scheme, the regulatory superstructure is based on the classification of services. The basis, ability, tools, and nature of competition are governed by the particular classifications of services and the interrelated regulatory requirements that are dependent on those classifications. Far more than simply labeling retail services as competitive is involved in the appropriate classification of AT&T Illinois services.

Under the Act, services are classified either as noncompetitive or competitive. 220 ILCS 5/13-502. AT&T Illinois, as an incumbent local exchange carrier, provides both noncompetitive and competitive services. The Act recognizes AT&T Illinois' particular situation and structures numerous other parts of the comprehensive statutory

scheme around this fact, triggering other regulatory requirements. Due to its having noncompetitive services, AT&T Illinois has submitted those noncompetitive services to an alternative form of regulation under Section 13-506.1. *Illinois Bell Telephone Company, Petition to Regulate Rates and Charges of Noncompetitive Services Under An Alternative Form of Regulation,* ICC Docket No. 92-0448, Order, October 11, 1994. It is the only telecommunications carrier in Illinois so regulated. See *Big Sky Excavating Co. v. Illinois Bell Telephone Company,* 217 Ill.2d 227, 2005 WL 3211667, p. 8 (December 1, 2005).

In the 2001 rewrite of the Act, the General Assembly enacted significant amendments to the comprehensive scheme applicable specifically to AT&T Illinois' status as a provider of noncompetitive services subject to alternative regulation. As part of an overall approach addressing telecommunications competition, in the 2001 rewrite the General Assembly statutorily reclassified all of the business services of a carrier subject to alternative regulation from noncompetitive to competitive, abating ongoing hearings at the Commission regarding such classification and potential refunds for previous misclassification. As AT&T Illinois is the only carrier under alternative regulation, these changes applied only to it and culminated five years of attempts by AT&T Illinois to reclassify its business services. *Big Sky Excavating Co.*, 2005 WL 3211667, pp. 9 – 10.

The 2001 rewrite also enacted Section 13-801. This section imposes on an incumbent local exchange carrier that is subject to an alternative regulation plan particular additional state obligations to competing telecommunications carriers, including Petitioners. P.A. 92-22; 220 ILCS 5/13-801. (Despite repeated attacks by

AT&T Illinois, the Commission has continued to uphold AT&T Illinois' obligations to competing carriers under Section 13-801. *Illinois Bell Telephone Company, filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act,* ICC Docket No. 01-0614, Order on Remand (Phase I), April 20, 2005, Amendatory Order on Remand (Phase I), June 2, 2005, Order on Remand (Phase II), November 22, 2005. AT&T Illinois continues to oppose these obligations in a federal court complaint. Illinois Bell Telephone Company v. Hurley, et al., U. S. District Court, N.D. IL, 1:05-cv-1149 (Gottschall).) With the statutory reclassification of AT&T Illinois' business services to competitive, the noncompetitive classification of AT&T Illinois' residential services form the fundamental basis for AT&T Illinois' alternative regulation plan, and its additional obligations to competing carriers found under Section 13-801. AT&T Illinois residential services in MSA-1 (the Chicago LATA) comprise the bulk of the its remaining noncompetitive services. Any change in the classification of these services could significantly alter whether AT&T Illinois would continue under an alternative regulation plan for any remaining services classified as noncompetitive. Such potential to change AT&T Illinois' regulatory status would impact the other provisions of the statutory scheme. Petitioners have a clear interest in the appropriate classification of AT&T Illinois residential services and the circumstances applicable thereto.

In addition to this larger structure of the statute's organization premised on the classification scheme, there are particular provisions regarding reclassification of AT&T Illinois' services that are directly applicable to the interests of competing carriers. To reclassify a previously noncompetitive service as competitive, AT&T Illinois must perform long run service incremental cost studies ("LRSIC") to establish that it is not

cross subsidizing the competitive services with revenues from its noncompetitive services. 220 ILCS 5/13-502(d); Commission Rules Part 791. This requirement is not only to assure customers of AT&T Illinois' noncompetitive services that they are not paying inflated prices to support AT&T Illinois' competitive services, but also to prevent AT&T Illinois from anticompetitively and predatorily pricing its competitive services to prevent an equally efficient competitor from entering the market. See *AT&T v. MCI,* 708 F.2d 1081, 1112 – 1125 (7th Cir. 1983). Pursuant to the statutory requirements, AT&T Illinois purportedly has submitted LRSIC studies for its residential services in MSA-1. See AT&T Illinois Exhibit 6.0 (Barch) and attachments. The Petitioners have a recognizable interest in the appropriate application of these LRSIC studies.

Pursuant to Section 13-505.1 and Part 792 of the Commission's Rules, AT&T Illinois is required to perform imputation test when seeking to reclassify a noncompetitive service as competitive. 220 ILCS 5/13-505.1; Commission Rules Part 792. The imputation test requires AT&T Illinois to establish that the aggregate revenue for the service in question exceed the sum of: (1) specifically tariffed premium rates for noncompetitive services or noncompetitive service elements, or their functional equivalent, that are utilized to provide the service; (2) the LRSIC of facilities and functionalities that are utilized but not specifically tariffed; and (3) any other identifiable LRSICs associated with the provision of the service. An imputation test is appropriate to prevent cross subsidization and discrimination where one competitor is a provider of both noncompetitive and competitive services. See *Illinois Commerce Commission On Its Own Motion, Investigation into certain payphone issues as directed in Docket 97-0225*, ICC Docket No. 98-0195, Order, November 12, 2003, p.11. This seeks to ensure that

AT&T Illinois' competitive service does not receive noncompetitive service inputs effectively below the tariffed rates charged to its competitors. Competitive carriers are the primary proponents of this protection. See *Re Implementation of Section 13-505.1 of the Public Utilities Act Regarding Imputation of Costs,* ICC Docket No. 92-0210, Order, July 8, 1993. Pursuant to the statutory requirements, AT&T Illinois purportedly has submitted an imputation test for its residential services in MSA-1. See AT&T Illinois Exhibit 5.0 (Panfil) and attachments. The Petitioners have a recognizable interest in the appropriate application of the imputation test.

Another statutory requirement involved in an attempt to reclassify a noncompetitive service as competitive is the aggregate revenue test found in Section 13-507 and the Commission Rules Part 791.200. This requirement addresses the treatment of joint and common costs, such as overheads, that are shared between noncompetitive services and competitive services. The aggregate revenue test seeks to assure that the joint and common costs shared between AT&T Illinois' noncompetitive and competitive services are not shifted onto the noncompetitive services, giving its competitive services an anticompetitive cost recovery advantage over competing carriers' services. It was the competitive carriers that first highlighted the need and enforcement of this standard. See *Illinois Bell Telephone v. ICC,* 203 Ill.App.3d 424, 440 - 42 (2nd Dist 1990); see also *Re Implementation of Section 13-507 of the Public Utilities Act*, ICC Docket No. 92-0211, Order, August 17, 1994 (competitive carriers participation in the development of Commission Rule Part 791.200, aggregate revenue test). Pursuant to the statutory requirements, AT&T Illinois purportedly has submitted an aggregate revenue test for its residential services in MSA-1. See AT&T Illinois Exhibit 5.0 (Panfil) and attachments.

The Petitioners have a recognizable interest in the appropriate application of the aggregate revenue test.

Although the Commission Staff, the consumer intervenors, and the Petitioners desire the enforcement of the Act's requirements and policies, they do not necessarily share the same position nor provide the same input or perspective on the various issues. See *1995 AT&T Illinois Business Reclassification Order*, 1995 WL 17200717 (disagreement between Commission Staff and competing carriers regarding the appropriate classification of services); *Illinois Bell Telephone Company*, *Petition regarding Compliance with the Requirements of Section 13-505.1 of the Public Utilities Act*, ICC Docket No. 04-0461, Order, June 7, 2005 (contrary interpretations on the application of the imputation test between consumer intervenors and competing carrier intervenors). Petitioners' interests would not be represented by the other parties to the docket.

AT&T Illinois makes a general statement that granting the Petitions to Intervene would unduly complicate proceeding. Petitioners have participated in numerous dockets before the Commission over the past ten years without giving rise to any basis of inappropriate or unwarranted activity. Counsel for Petitioners has represented almost every segment of the competitive industry before the Commission over the last 20 years, including many telecommunications carriers that compete with each other. To the extent this docket involves the handling of proprietary information, it is appropriately addressed through the entry of a protective order. The handling of proprietary information is not unusual before the Commission, and even more common in service classification cases that by their nature deal with competitive market facts. AT&T Illinois is the primary

competitor of Petitioners, and Petitioners' counsel has dealt with its proprietary information for decades in numerous Commission dockets. As to the proprietary information of other competitive carriers, counsel for the Petitioners has routinely handled the proprietary information of numerous competitive carriers other than Petitioners without complication.

The Commission has long recognized the interests of competing carriers in the proposed reclassification of a noncompetitive service to competitive. The classification of services forms the regulatory structure of the Act and affects the comprehensive overall scheme that both regulates and protects Petitioners' rights and interests. A number of the attendant requirements involved in a competitive classification directly affect Petitioners' interests, and these interests would not be represented by other parties to the proceeding. There is no basis for AT&T Illinois' naked claim that granting Petitioners' intervention would unduly complicate or burden the proceedings.

WHEREFORE, for the above-stated reasons, Data Net Systems, L.L.C. and TruComm Corporation pray that their Petitions to Intervene be granted.

Respectfully submitted,

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	)	
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Services to be competitive telecommunications services	)	

NOTICE OF FILING

To: Service List Attached

You are hereby notified that I have this 9th day of February, 2006 filed with the Chief Clerk of the Illinois Commerce Commission the Response of Data Net Systems, L.L.C. and TruComm Corporation to the Objection of AT&T Illinois to Petitions to Intervene of Data Net Systems, L.L.C. and TruComm Corporation via the electronic e-docket system.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response of Data Net Systems, L.L.C. and TruComm Corporation to the Objection of AT&T Illinois to Petitions to Intervene of Data Net Systems, L.L.C. and TruComm Corporation were served upon the parties on the attached service list via electronic email on February 9, 2006.

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